STATE OF MICHIGAN

IN THE SUPREME COURT

HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC, Petitioner-Appellant, v TOWNSHIP OF MARION, Respondent-Appellee.	Supreme Court No. Court of Appeals No. 262437 Gm 1/31/06 Michigan Tax Tribunal No. 307906

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PETITIONER-APPELLANT HIGHLAND-HOWELL DEVELOPMENT COMPANY, LLC'S APPLICATION FOR LEAVE TO APPEAL

APPENDIX

NOTICE OF HEARING

PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

STATEMENT IDENTIFYING JUDGMENT AND ORDERS APPEALED FROM AND RELIEF SOUGHT

Appellant Highland-Howell Development Company, LLC ("Highland") seeks leave to appeal the Court of Appeals unpublished January 31, 2006 decision in *Highland-Howell Development Company, LLC v Township of Marion* (Docket No. 262437) (*see* Apx. A) and two Michigan Tax Tribunal ("MTT" or "Tribunal") orders, including: (1) the MTT Order Granting Respondent Township of Marion's ("Township") Motion For Reconsideration Of Order Denying Respondent's Motion For Summary Disposition and Order Granting Respondent's Motion For Summary Disposition, entered by the Honorable Kimbal R. Smith III on April 15, 2005 (*see* Apx. B); and (2) the MTT Order Denying Petitioner's Motion for Summary Disposition, entered by the Honorable Kimbal R. Smith, III on October 25, 2004 (*see* Apx. C.) This Court has jurisdiction over this matter pursuant to MCR 7.301(2).

Highland respectfully requests that this Court peremptorily reverse the Court of Appeals judgment and MTT orders or, in the alternative, that it grant leave and reverse the Court of Appeals and MTT decisions.

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QUESTIONS PRESENTED

1. Decisions of this Court hold that special assessments for public improvements are invalid where there is a substantial or unreasonable disproportionality between the amount assessed and the value that accrues to the land as a result of the improvements. Decisions of this Court also hold that actions seeking direct review of a township's decision concerning a special assessment for a public improvement are within the Michigan Tax Tribunal's ("MTT") exclusive jurisdiction. Appellant Highland-Howell Development Company, LLC ("Highland") claimed that the Township's noncompliance with the Public Improvements Act, 1954 PA 188, MCL 41.721-41.738 ("Act 188"), including approving, retroactively and without public notice, alterations in public improvement plans years after the special assessment for the improvement had been levied, resulted in a substantial and unreasonable disproportionality between the assessment and the value to the land. Did the Court of Appeals err in determining that Highland's claim was outside the jurisdiction of the MTT under the Tax Tribunal Act, 1973 PA 186, MCL 205.701-205.779 ("Tax Tribunal Act")?

   The MTT says NO.

   The Court of Appeals says NO.

   Highland says YES.

2. Section 6(3) of Act 188 provides that all assessments on an assessment roll are final and conclusive unless an action contesting the assessment is filed in a court of competent jurisdiction within 30 days after the date the roll was confirmed. Section 35(2) of the Tax Tribunal Act provides that the MTT's jurisdiction is invoked in special assessment matters where a petitioner files a written petition within 30 days after the final decision or determination that the petitioner seeks to review. Where, years after the special assessment roll for a public improvement project was confirmed, the township altered the design plans upon which the assessment was based and the special assessment taxpayer, within 30 days of the formal action approving that alteration, filed an action in the MTT challenging it, was such action properly within the jurisdiction of the MTT?

   The MTT says NO.

   The Court of Appeals says NO.

   Highland says YES.

3. In March 2004, the MTT dismissed a petition for lack of subject matter jurisdiction without reaching the merits of the claim and without dismissing another petition with which the dismissed petition was consolidated. Highland attempted to appeal as of right the MTT's March 2004 order, but its claim of appeal was dismissed by the Court of Appeals for lack of jurisdiction. Two months after the MTT's March 2004 order, the township involved in the dismissed petition adopted a resolution that, in

June 2004, the special assessment taxpayer involved in the dismissed petition challenged by filing another MTT petition.

Did the MTT and Court of Appeals err in holding that, under *res judicata* and collateral estoppel, the claims in the second petition were barred by the dismissal of the first?

The MTT says NO.

The Court of Appeals says NO.

Highland says YES.

4. Section 31 of the Tax Tribunal Act grants the MTT exclusive and original jurisdiction over "a proceeding for direct review of a final decision, finding, ruling, determination, or order of any agency relating to assessment, valuation, rates, special assessments, allocation or equalization, under property tax laws" and "a proceeding for refund or redetermination of a tax under the property tax laws." Highland claims that the Township's noncompliance with Act 188, including approving, retroactively and without public notice, alterations in public improvement plans years after the special assessment for the improvement was levied, resulted in a substantial and unreasonable disproportionality between the assessment and the value to the land, and claims a refund. Did the Court of Appeals err in determining that Highland's claim was outside the jurisdiction of the MTT under the Tax Tribunal Act?

The MTT says NO.

The Court of Appeals says NO.

Highland says YES.

INTRODUCTION

The Court of Appeals decision, although "unpublished," will perpetuate and compound confusion in Michigan among property owners, townships, and the Michigan Tax Tribunal ("MTT" or "Tribunal") about whether, with respect to special assessments levied to pay for public improvements under the Public Improvements Act, 1954 PA 188, MCL 41.721-41.738 ("Act 188"), a property owner has the right to challenge a special assessment amount if the township substantially reduces the benefit of the public improvement to the property after the time for challenging the assessment has expired. The decision further perpetuates and compounds confusion about whether the MTT, the agency charged by the Legislature to hear challenges relating to special assessments, possesses jurisdiction to hear challenges concerning the reduced benefit and to review the township's actions to determine whether they conform with the statutory and fundamental due process protections afforded to property owners when special assessments are levied to pay for public improvements.

The MTT and Court of Appeals decided that the MTT is without jurisdiction to hear a property owner's claims that the amount of a special assessment was disproportionate to the actual benefit conferred on the property and that the township failed to comply with Act 188 when the Township ratified, seven years after the special assessment was levied, the alteration of the public improvement's design plan. The MTT and Court of Appeals further held that, in any event, *res judicata* (MTT) and collateral estoppel (Court of Appeals) barred "relitigation" of a claim that did not come into existence until years after the first action.

Under the MTT and Court of Appeals decisions, the action of the Township, adopting a resolution changing the public improvement project's design plan after the Township had issued the public notice, conducted public hearings, and confirmed the

special assessment roll – *without complying with the requirements of Sections 4 and 5* of Act 188 – is completely insulated from review.

The MTT and Court of Appeals decisions should be reviewed and reversed by this Court because they render unenforceable the statutory process mandated by the Legislature in Act 188 and they conflict with decisions of this Court that require – as due process – proportionality between the amount of a special assessment and the benefit it confers and candor in notices for public improvement projects.

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. PREFACE.

This application for leave to appeal involves a $3.2 million special assessment levied for a sanitary sewer improvement project by the Township against 200 acres of Highland's property ("Property"). An understanding of special assessments and the procedure for levying such assessments is essential to the analysis of the questions presented by this case.

1. A Description Of Special Assessments.

A special assessment is a levy upon property within a specified district. As this Court explained in *Kadzban v City of Grandville*, 442 Mich 495, 500; 502 NW2d 299 (1993):

> Although [a special assessment] resembles a tax, [it] is not a tax . . . . In contrast to a tax, a special assessment is imposed to defray the costs of specific local improvements, rather than to raise revenue for general governmental purposes. . . . There is a clear distinction between what are termed general taxes and special assessments. The former are burdens imposed generally upon property owners for governmental purposes without regard to any special benefit which will inure to the taxpayer. The latter are sustained upon the theory that the value of the property in the special assessment district is enhanced by the improvement for which the assessment is made. . . . In other words, a special assessment can be seen as remunerative; it is a specific levy designed to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area. (Citations omitted).

2. Act 188 Prescribes The Statutory Process For Public Improvements And For Levying Special Assessments To Defray The Cost Of Such Improvements.

Act 188 governs special assessments levied by Michigan townships. The Court of Appeals has described Act 188 as "a rather elaborate and lengthy process designed to determine the need for and assess the cost of public improvements." *Rusak v Acme Twp*, 124 Mich App 805, 813; 336 NW2d 771 (1983).

Act 188 authorizes townships to make public improvements, to provide for the payment for the improvement by the issuance of bonds, and to defray the whole or part of the cost of the improvement by special assessments against the property especially benefited by the improvement. MCL 41.721. A variety of public improvements can be made under Act 188, including the "construction, improvement and maintenance of storm or sanitary sewers." MCL 41.722(1)(a).

a. Tentative Designation Of Special Assessment District.

The township board, if it desires to proceed with an improvement, must "cause to be prepared plans describing the improvement and the location of the improvement with an estimate of the cost of the improvement on a fixed or periodic basis, as appropriate." MCL 41.724(1). Upon receipt of the plans and cost estimate, the township board must file such with the township clerk and, if it desires to proceed with the improvement, the board must "declare by resolution its intention to make the improvement and tentatively designate the special assessment district against which the cost of the improvement or a designated part of the improvement is to be assessed." MCL 41.724(1).

b. Notice Of Public Hearing On Objections.

Once the township issues its resolution announcing its intention to proceed with the improvement and tentatively designating a special assessment district, the township must provide notice and hold a public hearing to "hear any objections to the petition, if a petition is required, to the improvement, and to the special assessment district." MCL 41.724(2). *See also* MCL 41.724a (discussing the notice of hearings for special assessments). The notice "shall state that the plans and estimates are on file with the township clerk for public examination and shall contain a description of the proposed special assessment district." MCL 41.724(2). If periodic redeterminations of cost will be necessary without a change in the special assessment district, the notice also must include in its estimate of

costs any projected incremental increases and state that such redeterminations will be made without further notice. MCL 41.724(2), (4).

c. Public Hearing On Objections.

At the public hearing (or any adjournment of the hearing), the township must hear any objections to the improvements and to the special assessment district. MCL 41.724(3). At that hearing, the "township board may revise, correct, amend or change the plans, estimate of cost, or special assessment district." MCL 41.724(3).

d. Requirements Of Board Resolution And Special Assessment Roll.

After the public hearing is held, and if the township board desires to proceed with the improvement, the township board "shall approve or determine by resolution" four items: (1) the completion of the improvement; (2) "the plans and estimate of the cost as originally presented or as revised, corrected, amended or changed"; (3) the sufficiency of any required petition; and (4) the special assessment district, including the term of the district's existence. MCL 41.725(1)(a)-(d). After finally determining the special assessment district, the township board must direct the township supervisor to make a special assessment roll that identifies the parcels of land to be assessed, the owners of those lands, and the amount to be assessed against each parcel of land. MCL 41.725(1)(d). The amount assessed against each parcel "shall be the relative portion of the whole sum to be levied against all parcels of land in the special assessment district as the benefit to the parcel of land bears to the total benefit to all parcels of land in the special assessment district." MCL 41.725(1)(d). When the supervisor completes the assessment roll, he must certify that the "roll was made pursuant to a resolution of the township board adopted on a specified date, and that in making the assessment roll the supervisor, according to his or her best

judgment, has conformed in all respects to the directions contained in the resolution and the statutes." MCL 41.725(1)(d).

e. Public hearing On And Confirmation Of Special Assessment.

Once the supervisor reports the special assessment roll to the township board, the assessment roll is filed with the township clerk's office. MCL 41.726(1). Before confirming the assessment roll, the township board must "appoint a time and place when it will meet, review, and hear any objections to the assessment roll." MCL 41.726(1). At the public hearing, the township board "may confirm the special assessment as reported to the township board by the supervisor or as amended or corrected by the township board; may refer the assessment roll back to the supervisor for revision; or may annul it and direct a new roll to be made." MCL 41.726(2). If a special assessment roll is confirmed, the "township clerk shall endorse on the assessment roll the date of the confirmation." MCL 41.726(3). After a special assessment roll's confirmation, all assessments are "final and conclusive unless an action contesting an assessment is filed in a court of competent jurisdiction with 30 days after the date of confirmation." MCL 41.726(3).

f. Remedies For Noncompliant Proceedings.

Act 188 also contains remedies for illegal or irregular special assessment proceedings. If a township board determines that the special assessment is invalid by reason of irregularities or informalities in the proceedings, or if a court of competent jurisdiction determines the assessment is illegal, "the township board shall, whether the improvement has been made or not, whether any part of the assessment has been paid or not, have the power to proceed from the last step at which the proceedings were legal and cause a new assessment to be made for the same purpose for which the former assessment was made." MCL 41.733. "All proceedings on such reassessment and for the collection thereof shall be conducted in the same manner as provided for the original

assessment, and whenever an assessment or any part thereof levied upon any premises has been so set aside, if the same has been paid and not refunded, the payment so made shall be applied upon the reassessment." MCL 41.733.

B. DESCRIPTION OF FACTS AND PROCEEDINGS.

1. In 1996, The Township Passed A Resolution Levying A Special Assessment On The Property; The Project Design Called For A Sewer Trunk Line To Be Located Across The Property.

a. The Township's March 14, 1996 Resolution Accepted The Project, Including A Trunk Line Across The Property.

The Township determined in the mid-1990's to proceed with a sanitary sewer improvement project ("Project"). On March 14, 1996, the Township Board of Trustees ("Township Board") adopted a resolution accepting and approving the Project's plans and ordering the filing of the plans with the Township clerk. It also "tentatively" declared its intention to construct the Project and "tentatively" designated the special assessment district ("SAD"). (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ 7.) The Project map attached to the March 14, 1996 resolution and available for public examination showed a trunk line across the Property. (*Id.* at ¶ 14.)

b. At The April 11, 1996 Public Hearing, The Township Passed A Resolution Approving The Project Plans, Including The Construction Of A Trunk Line Across The Property. All Information Available To The Public Showed A Trunk Line Across The Property.

On April 11, 1996, the Township Board conducted a public hearing and adopted a resolution approving the Project plans. The resolution also approved a Notice of Public Hearing that identified the total Project cost as $4.5 million. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ ¶12-13.) All Project maps available for public review and included in public notices showed a sewer trunk line across the Property. (*Id.* at ¶ 14.)

c. On December 2 1996, The Township Adopted A Resolution Confirming The Special Assessment And Assessing The Property $3,250,000.

On December 2, 1996, the Township Board adopted a resolution confirming the special assessment.[1] (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ 35.) The December 2, 1996 assessment roll included a total assessment of $12,380,000 for all properties, with Highland's Property being assessed in an amount of $3,250,000.[2] (*Id.* at ¶ 38.) All documents available for public examination, including the public notices, showed a trunk line across the Property. (Apx. E, Twp. 7/7/04 Br. Mtn. Sum. Disp., Ex. B, Trib. Order Dkt. 431, pp. 6-7, ¶ ¶ 7-9.) The confirmed design plans also had a trunk line crossing the Property. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ ¶ 14, 44.)

d. Highland Did Not Protest The 1996 Assessment Because It Believed The Trunk Line Was Beneficial.

Highland did not protest the planned improvement at any of the 1996 public hearings. Highland believed the project design was beneficial because Highland could access the sanitary sewer line crossing its Property without having to incur additional costs of building its own lines across the mile-wide Property to tap into the sewer system at the western boundary. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ 33; Apx. E, Twp. 7/7/04 Br. Mtn. Sum. Disp., Ex. B, Trib. Order. Dkt. 431, p 5.)

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[1] Public hearings were also held on October 10, 1996 and November 14, 1996 for the purpose of approving a contract with the County of Livingston for the construction of the sewer system and for estimating Project costs. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ ¶ 19-30.)

[2] The assessment was later modified to $3,161,925. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ 64).

2. In 1997 The Township Altered The Project Design, Including Eliminating The Trunk Line Across The Property, Without Public Notice And Without A Resolution.

In mid-1997, one or more of the Township officials decided that it was no longer necessary or desirable to construct the sewer trunk line across the Property because the sewer improvement project was substantially exceeding the projected costs and the Township needed to save money. (Dkt # 8, High. Br. Opp. Mtn. Sum. Disp, Ex., Stip. Facts, ¶ 44; Dkt # 10, Order Den. Twp. Mtn. Sum. Disp., p. 2.) The Township thus caused the trunk line to be stricken from the Property on the design plans, and thereafter no trunk line was constructed on the Property. At this time, the Township's decision to strike the trunk line from the Property had not been discussed at a public meeting, had not been approved in the form of a resolution, and had not been communicated to the public or Highland. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ 44; App. C, Trib. 10/25/04 Order Dkt. 906, p. 2.)

3. Highland Discovered By Chance That The Township Had Altered The Project Design, Including Eliminating The Trunk Line Across The Property, Without Public Notice And Without A Resolution.

On June 11, 1998, a Highland representative was at the Township office and, by chance, saw a Project map that showed the trunk line originally on the Property stricken out by markings. Upon questioning by the Highland representative, the Township Supervisor confirmed that the Township had eliminated the trunk line across the Property. (Apx. E, Twp. 7/7/04 Br. Mtn. Sum. Disp., Ex. B, Trib. Order Dkt. 431, p. 9, ¶ 14.)

4. Highland Litigated To Challenge The Township's 1996 Assessment In Light Of The Township's Subsequent Unofficial Elimination Of The Trunk Line.

a. Highland Filed A Petition At The MTT, Initiating Docket 431 That Challenged The 1996 Assessment. The Township Moved To Dismiss The 431 Petition For Lack Of Subject Matter Jurisdiction Because The Action Was Not Filed Within 30 Days Of The Township's December 2, 1996 Special Assessment Confirmation Date.

After discovering that the Township had eliminated the trunk line from the Property, on July 21, 1998, Highland filed a petition in the MTT challenging the Township's actions, including that the Township: (1) did not follow Act 188's requirements for imposing an assessment because there were no accurate cost estimates or plans available for public review; and (2) did not validly confirm the special assessment roll and therefore the time limits for objecting and appealing never commenced. (Apx. E, Twp. 7/7/04 Br. Mtn. Sum. Disp., Ex. B, Trib. Order Dkt. 431, pp. 11-12.) The case was docketed as Case No. 261431 ("Docket 431"). (App. C, Trib. 10/25/04 Order Dkt. 906, p. 2.) The Township moved to dismiss the case on the basis that the MTT lacked subject matter jurisdiction because Highland had not filed its petition in the MTT within 30 days after December 2, 1996, the date the Township passed a resolution confirming the special assessment. (*Id.* at p. 11.)

b. In 1998, Highland Sued In Livingston County Circuit Court.

On August 18, 1998, Highland commenced a civil action in Livingston County Circuit Court, Case No. 98-16767-CZ. (Apx. F, Twp. 11/5/04 Mtn. Recon. Order Den. Resp. Mtn. Sum. Disp., Ex. C, 10/15/04 Cir. Ct. Order.) In 2004, on remand after an interlocutory appeal[3], a Third Amended Complaint was filed that alleged five causes of action. Count III

[3] In Count I of its first amended complaint, Highland sought damages for breach of contract and promissory estoppel based on the Township's alleged breach of a promise to construct a sewer line on its property. Count II challenged the validity of the special assessment levied by the Township. *See Highland-Howell Dev Co LLC v Marion Twp,* unpublished per curiam of the Court of Appeals, decided November 19, 2002 (Docket No

alleged that the Township acted illegally by eliminating the trunk line across the Property after the special assessment roll was confirmed. (*Id.*) It requested that the Circuit Court declare: (i) that the Township had no legal basis for changing the plans for the sewer project; (ii) that the Township's May 13, 2004 resolution purportedly ratifying the design plan changes was illegal and void; (iii) that the relevant plans were those the Township made available to the public before it levied the December 2 1996 special assessment. (*Id.*)

5. In 1999, The Township Assessed An Additional $286,925 To The Property And Highland Initiated Docket 534, Contesting The Additional Assessment. The MTT Consolidated Dockets 431 and 534.

On April 21, 1999, the Township Board adopted a Resolution Confirming Supplemental Special Assessment Rolls. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ ¶ 69-70.) The first supplemental roll included an assessment of $286,925 on the Property. The total assessment for all property shown on the new assessment roll was $1,178,139. (*Id.*) On May 13, 1999, Highland filed a petition with the MTT that was docketed as Case No. 266534 ("Docket 534"). Highland's petition alleged that the 1999 supplemental assessment was unlawful and excessive. On November 1, 2000, the MTT issued an order consolidating Dockets 431 and 534. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ 3.)

231937), 2002 WL 31934159 at * 1. (Copy attached at Apx. I.) The trial court dismissed both Counts I and II on the basis that it lacked subject matter jurisdiction and Highland challenged only the dismissal of Count I on appeal. In a decision that expressly "consider[ed] the scope of the Tax Tribunal's exclusive jurisdiction," *id.,* the Court of Appeals stated the following with regard to Highland's decision not to challenge the dismissal of Count II: "Here, the *Wikman* and *Romulus* decisions plainly indicate that the Tax Tribunal has exclusive jurisdiction over any challenge to a special assessment. Accordingly, [Highland] wisely abandoned count II." *Id.* at * 2. On the breach of contract and promissory estoppel claims alleged in Count I, the Court of Appeals reversed the circuit court's dismissal for lack of subject matter jurisdiction, *id.*, and held that summary disposition under MCR 2.116(C)(8) was premature. This Court affirmed the Court of Appeals holding that Highland's breach of contract and promissory estoppel claims were outside the exclusive jurisdiction of the Tribunal. *Highland-Howell Dev Co LLC v Marion Twp*, 469 Mich 673; 677 NW2d 810 (2004).

6. **On January 27, 2004 The MTT Administrative Law Judge Issued A Proposed Opinion and Judgment Dismissing Docket 431 For Lack Of Subject Matter Jurisdiction. On March 19, 2004, The MTT Affirmed The Proposed Opinion And Judgment.**

On January 27, 2004, the presiding MTT administrative law judge issued a Proposed Opinion and Judgment holding that the MTT lacked subject matter jurisdiction to hear Docket 431. (Apx. E, Twp. 7/7/04 Br. Mtn. Sum. Disp., Ex. B, Trib. Order Dkt. 431, pp. 11-12.) The holding was based on the determinations that: Act 188 requires changes in design plans to be made at the hearing held under Section 4 of Act 188; the law requires a township board to adopt a resolution before it may make changes to previously approved plans; and the MTT acquires jurisdiction over a special assessment only if the petitioner first protests at the public hearing and invokes the MTT's jurisdiction by filing a written petition within 30 days after a final decision, ruling, determination or order is issued. (*Id.* at p. 32.) Because Highland had not objected at the public hearing or commenced an appeal to the MTT within 30 days after the December 2, 1996 resolution confirming the roll, the judge concluded that the MTT lacked subject matter jurisdiction. (*Id.* at pp. 32-38.) The MTT judge also found that procedural irregularities occurring before the December 2, 1996 resolution were insufficient to confer jurisdiction on the MTT because they had not been protested timely. The MTT judge recommended that the MTT dismiss Docket 431 for lack of jurisdiction but that "[the] Order does not dismiss the consolidated case, MTT Docket No. 266534, for which there is no dispute regarding jurisdiction." (*Id.* at p. 2.) On March 19, 2004, the MTT affirmed the Proposed Opinion and Judgment. (Apx. B, Trib. 4/15/05 Order Dkt. 906, p 2.)

7. **Highland Appealed Docket 431 To The Court Of Appeals As Of Right. Upon The Township's Motion Arguing The Order Was Not A Final Appealable Order, The Court Of Appeals Dismissed Docket 431.**

On March 29, 2004, Highland filed a claim of appeal to the Court of Appeals of the March 19, 2004 MTT Order. The Township moved to dismiss the appeal for lack of jurisdiction because the appeal of the dismissal of Docket 431 was not an appeal from a "final order." On May 26, 2004, the Court of Appeals granted the Township's motion to dismiss. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 6, Court of Appeals Order.)

As an alternative to its claim of appeal, in the event the consolidation of Dockets 431 and 534 had rendered the dismissal of Docket 431 a non-final order, Highland also filed an application for leave to appeal. The Court of Appeals denied the application for leave to appeal on August 13, 2004 for "lack of merit in the grounds presented."

8. **On May 13, 2004, The Township Passed A Resolution "Ratifying Certain Changes In Plans For Sanitary Sewer Improvements," Including The 1997 Elimination Of The Trunk Line From The Property.**

On May 13, 2004, the Township Board adopted a resolution titled "Resolution Ratifying Certain Changes In Plans For Sanitary Sewer Improvements" that "acknowledged, approved and ratified" all Project changes with respect to the project that was the subject of the March 14, 1996 resolution and the contract with the County of Livingston effective November 1, 1996. The changes included the elimination of the trunk line across the Property. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp., Ex. 1, Stip. Facts, ¶ 3; Apx. E, Twp. 7/7/04 Br. Mtn. Sum. Disp., Ex. C, 5/13/04 Resolution.) There is no evidence that a revised design plan or map was filed or published in accordance with Act 188 procedures before the May 13, 2004 resolution was adopted.

9. On June 14, 2004, Highland Initiated MTT Docket 906, Contesting The Township's May 13, 2004 Action.

On June 14, 2004, in response to the Township's May 13, 2004 resolution, Highland filed in the MTT a petition, Case No. 307906 ("Docket 906"), challenging "[t]he elimination of the trunk line [that] substantially changed the benefit to Highland of the sewer project." Highland asked the MTT to hold that "the change in plans for the sewer project is illegal and void," or in the alternative, that "the change in plans for the sewer project substantially changes the benefit to Highland of the sewer improvements and therefore the special assessment imposed on Highland's property is not proportional to the benefit to the property and is not imposed in accordance with the proportionality requirements of MCL 41.725(1)(d)." (Apx. G, High. 6/14/04 Pet. Dkt. 906, ¶ ¶ 11, 12, 14.)

10. On July 7, 2004, The Township Moved To Dismiss Highland's Petition In Docket 906, Alleging That The Claims Were Barred By Collateral Estoppel And *Res Judicata*. On July 16, 2004, Highland Requested Summary Disposition.

On July 7, 2004, the Township filed a motion to dismiss Docket 906 under MCR 2.116(C)(7) and (10), alleging that the claims were barred by collateral estoppel and *res judicata*. (Apx. E, Twp. 7/7/04 Br. Mtn. Sum. Disp.) The Township argued that the petition in Docket 906 was barred because it attempted to relitigate claims in Docket 431, and that the Township's May 13, 2004 resolution did not provide an independent basis for challenging the assessment because the resolution merely made an unofficial action official. (*Id.*)

Highland filed a response on July 16, 2004 contending that its claims were not barred because: (1) the MTT Decision in Docket 431 dismissing for lack of subject matter jurisdiction was neither a final decision nor a decision on the merits, and neither *res judicata* nor collateral estoppel applies when the previous decision was a dismissal for lack of

subject matter jurisdiction, or when it was not a ruling on the merits; and (2) neither *res judicata* nor collateral estoppel applies to bar a claim based on formal action taken after dismissal of the previous action. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum.) In its July 16, 2004 response opposing the Township's motion, Highland also requested summary disposition, pursuant to MCR 2.116(I)(2), on the basis that "the Township cannot change the plans for a special assessment project to eliminate a substantial benefit to a property owner after confirmation of the assessment roll. Thus the Township's May 13, 2004 resolution changing the sewer plans is invalid." (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum., p 15.)

11. On June 25, 2004 And July 19, 2004, Highland And The Township Filed Cross-Motions For Summary Disposition In The Circuit Court Litigation.

On June 25, 2004, in two separate motions, Highland moved the Livingston County Circuit Court for summary disposition on all five counts of its Third Amended Complaint. (Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum. Disp.) On July 19, 2004, the Township filed a cross-motion to dismiss Highland's complaint, including a request to dismiss Count III on the basis that the claim was barred by *res judicata* and collateral estoppel. (Apx. F, Twp. 11/5/04 Mtn. Recon. Order Den. Resp. Mtn. Sum. Disp., Ex. C, 10/15/04 Cir. Ct. Order.)

12. On October 15, 2004, The Circuit Court Granted The Township's Motion To Dismiss Highland's Complaint.

The Livingston County Circuit Court issued an Opinion and Order on October 15, 2004 granting summary disposition in the Township's favor on all of the claims alleged by Highland, including Count III. (Apx. F, Twp. 11/5/04 Mtn. Recon. Order Den. Resp. Mtn. Sum. Disp., Ex. C, 10/15/04 Cir. Ct. Order.) With regard to Highland's declaratory judgment claim in Count III, the trial court held that: because it lacked subject matter jurisdiction, summary disposition was appropriate pursuant to MCR 2.116(C)(4); because another action

(MTT Docket 906) had been initiated between the same parties involving the same claims, summary disposition was appropriate pursuant to MCR 2.116(C)(6); and because no genuine issue of material fact existed, summary disposition was appropriate pursuant to MCR 2.116(C)(10). (*Id.* at p. 9.)

13. <u>On October 25, 2004, The MTT Denied The Township's Motion To Dismiss Docket 906 And Denied Highland's Request For Summary Disposition.</u>

On October 25, 2004, in MTT Docket 906, the MTT issued an Order Denying Respondent's Motion For Summary Disposition and an Order Denying Petitioner's Motion for Summary Disposition. (Apx. C, Trib. 10/25/04 Order Den. Resp. Mtn. Sum. Disp. and Order Den. Pet. Mtn. Sum. Disp.) In denying the Township's motion to dismiss, it found that the facts in the second case, *i.e.*, Docket 906, had changed substantially from those in the first case, Docket 431, and held, *inter alia*, that *res judicata* and collateral estoppel were inapplicable to bar the Docket 906 petition. It stated:

> The Tribunal finds that Respondent's resolution adopted on May 13, 2004 to eliminate the construction of the trunk line across Petitioner's property is valid pursuant to MCL 47.125(1)(b). The Tribunal finds that *res judicata* is inapplicable. MCR 2.504(B)(3) provides that '[u]nless the court otherwise specifies in its order for dismissal, a dismissal under this subrule or a dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction . . ., operates as an adjudication on the merits.' The Tribunal finds that the prior action in MTT Docket No. 261431 was not an adjudication on the merits because it was dismissed for lack of subject matter jurisdiction and the judgment in such case did not specify in its order that the dismissal is an adjudication on the merits. Furthermore, the facts in the subsequent case have substantially changed from those in the first case such that the issues contested in the second case could not have been litigated nor could they have been presented in the first action. Therefore, the Tribunal concludes that Respondent fails to meet the requirements of *res judicata.* The Tribunal finds that collateral estoppel is inapplicable because the issue in this subsequent matter was not actually litigated in the first action. The Tribunal further finds that there are still genuine issues of material fact as to whether the special assessment imposed on Petitioner's property is proportional to the benefit to the property by the sewer improvement project.

(Apx. B., p 6.)

14. On November 5, 2004, The Township Moved The MTT To Reconsider Its October 25, 2004 Order Denying The Township's Motion For Summary Disposition.

On November 5, 2004, the Township moved the MTT for reconsideration of its October 25, 2004 Order denying its motion for summary disposition, arguing that collateral estoppel and *res judicata* applied because the Livingston County Circuit Court had granted the Township's motion to dismiss Highland's claims, "including Count 3 of the Third Amended Complaint, which contained the same substantive allegations and request for relief that Petitioner seeks in this instant appeal before the Tax Tribunal." (Apx. F, Twp. 11/5/04 Mtn. Recon. Order Den. Resp. Mtn. Sum. Disp., ¶ 3.) Highland opposed the motion. (Apx. H, High. 11/18/04 Resp. Opp. Twp. Mtn. Recon.)

15. On December 1, 2004, The MTT Consolidated Dockets 534 And 906.

On December 1, 2004, the MTT issued an order consolidating Docket 534 with Docket 906. (Dkt. # 18; Apx. H, High. 11/18/04 Resp. Opp. Twp. Mtn. Recon.)

16. On April 15, 2005, The MTT Reconsidered Its October 25, 2004 Order Denying Summary Disposition To The Township, Granted Summary Disposition In Favor Of The Township, And Severed Docket Nos. 534 and 906.

On April 15, 2005, the MTT issued an Order Granting Respondent Township of Marion's Motion For Reconsideration Of Order Denying Respondent's Motion For Summary Disposition And Order Granting Respondent's Motion For Summary Disposition. As its reasons for granting the Township's motion for reconsideration, and although the Township had based its motion for reconsideration on the Livingston County Circuit Court's order, the MTT stated that the "Tribunal's Order Denying Respondent's motion for summary disposition entered October 25, 2004 did not fully take into account the March 19, 2004 Opinion and Judgment in Docket No. 261431 as an adjudication on the merits pertaining to

jurisdiction, and therefore is reason to reconsider that order." (Apx. B, Trib. 4/15/05 Order Dkt. 906, p 3.)

The MTT went on to hold that the March 19, 2004 order in Docket 431 "fully considered and rendered legal conclusions with regard to all issues pertaining to *official or unofficial* changes to the plans in relation to the jurisdiction of the Tribunal" and that "[t]he *official* resolution of Marion Township adopted May 13, 2004 that 'acknowledged, approved and ratified' the change in the plans does not alter the previous ruling that the Tribunal lacks jurisdiction over the 1996 special assessment role [sic]." (Apx. B, Trib. 4/15/05 Order Dkt. 906, p 3) (Emphasis supplied by MTT.) It concluded that:

> [T]he jurisdictional issues raised in the Petition filed in this case with regard to the special assessment roll confirmed December 2, 1996 have already been decided. It was previously ruled that changes in the plans, 'official or unofficial,' have no effect upon the validity and conclusiveness of the December 2, 1996 special assessment roll. The May 13, 2004 resolution by the Township of Marion does not allow Petitioner to appeal the special assessment that was confirmed December 2, 1996. **'By law, the amounts assessed on the roll confirmed December 2, 1996 became final and conclusive 30 days after confirmation and cannot be overturned at this time. MCL 41.726(3).**' March 19, 2004 Opinion and Judgment-Final Decision on Proposed Opinion And Judgment.
>
> The Tribunal's Order Denying Respondent's Motion For Summary Disposition entered October 25, 2004 did not fully take into account the March 19, 2004 Opinion and Judgment when it found that there were 'still genuine issues of material fact as to whether the special assessment imposed on Petitioner's property is proportional to the benefit to the property by the sewer improvement project.' Any issues of fact pertaining to the 1996 special assessment in Docket No. 307906 are not before the Tribunal because there is no jurisdiction over that appeal. There are no factual issues with regard to the lack of jurisdiction.

(Apx. B, Trib. 4/15/05 Order Dkt. 906, p. 4) (Emphasis supplied by MTT.) The MTT's April 15, 2005 Opinion also disagreed with the Court of Appeals that the March 19, 2004 Docket 431 Order was not a final order or judgment. (Apx. B, Trib. 4/15/05 Order Dkt. 906, p. 3.) The Order granted the Township's motion for reconsideration, granted the Township's motion for summary disposition, severed Docket 534 from 906, and dismissed Docket 906.

17. On May 5, 2005, Highland Appealed To The Court of Appeals.

On May 5, 2005, Highland claimed an appeal from the MTT's: (1) April 15, 2005 Order Granting Respondent Township of Marion's Motion For Reconsideration Of Order Denying Respondent's Motion For Summary Disposition and Order Granting Respondent's Motion For Summary Disposition; and (2) October 25, 2004 Order Denying Petitioner's Motion for Summary Disposition.

On January 31, 2006, the Court of Appeals issued a unanimous unpublished decision affirming the MTT. (Apx. A.) The Court of Appeals held that the MTT lacked jurisdiction to consider Highland's claims in the Docket 906 petition on two grounds. First, it concluded that the Township's May 13, 2004 resolution altering the project design "has no effect on the jurisdictional requirements of MCL 205.725" and that "because petitioner failed to challenge the December 2, 1999, assessment within 30 days of its confirmation, the Tax Tribunal had no jurisdiction to address petitioner's challenge to the assessment." (*Id.* at p 6.) Second, the Court of Appeals determined that the MTT, under Section 31 of the Tax Tribunal Act, MCL 205.731, "does not have exclusive jurisdiction over any claim that respondent failed to comply with the Public Improvements Act or any request that respondent be required to rebuild the sewer" and that Highland's claims in Docket No. 906 do not "seek a review 'relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws" or "seek a 'refund or redetermination of a tax under the property tax laws.'" (*Id.*)

In addition to its ruling on jurisdiction, the Court of Appeals determined that collateral estoppel barred the Docket 906 petition because that petition "again alleged that, because respondent changed the sewer plans after the December 2, 1996, roll assessment, petitioner is entitled to challenge the December 2, 1996, roll assessment." (Apx. A, p 5.) The Court stated:

> This issue was already resolved in the prior petition, where the Tax Tribunal held that a departure from the requirements of the Public Improvements Act does not excuse the jurisdictional requirements in the Tax Tribunal Act. The Tax Tribunal already ruled that it had no jurisdiction over petitioner's challenge [sic] the December 2, 1996, roll assessment because petitioner failed to initiate the challenge within 30 days of confirmation of the roll assessment. This issue actually and necessarily determined in the prior proceeding, *Barrow, supra* at 480 and the parties had a full and fair opportunity to litigate the issue, *VanVorous supra* at 480.

(*Id.* at p 5.) The Court of Appeals found that collateral estoppel applied even though Highland never had an opportunity to challenge the 431 ruling on appeal. Highland had argued that the Court of Appeals dismissed its claim of appeal of that ruling, at the Township's urging, on the basis that the MTT Order in Docket 431 was not a final appealable order because the case with which it was consolidated, Docket 534, was still pending when the claim of appeal was filed. (Apx. A, pp 5-6; Apx. D, High. 7/16/04 Bf. Opp. Mtn. Sum.) Although the MTT never issued an order severing Docket 431 nor, before April 2005, ever suggested that any other order "had the effect of severing" Docket 431 from Docket 534[4], the Court of Appeals appeared to conclude that Docket 431 in fact eventually had been severed and that the 431 ruling was a final judgment:

> Although this Court denied petitioner's claim of appeal of the ruling in MTT Docket No. 261431, it did so on the basis that the claims in the consolidated MTT Docket No. 266534, were still outstanding. However, the claims in MTT Docket No. 266534 were **apparently severed** from MTT Docket No. 261431 because the Tax Tribunal later consolidated those claims with the claims in this petition. Later, it severed the claims in Docket No. 266534 from this case as well. Therefore, we conclude that MTT Docket No. 261431 culminated in a valid final judgment.

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[4] *See* April 15, 2005 Opinion (Apx. B, Trib. 4/15/05 Order Dkt. 906, p. 3.)

(Apx. A, p 5 (Emphasis supplied).) Without discussion, the Court of Appeals also held that the MTT erred in holding that *res judicata* barred the MTT's consideration of Highland's 906 petition. (Apx. A, p 4.)

STANDARD OF REVIEW

An applicant for leave to appeal is entitled to relief upon a showing that its case satisfies one of the six grounds for appeal enumerated in MCR 7.302(B), including that the issue involves "legal principles of major significance to the state's jurisprudence," MCR 7.302(B)(3), or that the Court of Appeals decision "is clearly erroneous and will cause material injustice or . . . conflicts with a Supreme Court decision or another decision of the Court of Appeals." MCR 7.302(B)(5).

This Court reviews MTT decisions to determine "whether the tribunal erred in applying the law or adopted a wrong principle." *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 18-19; 678 NW2d 619 (2004). Factual findings of the MTT may be overturned if they are not "supported by competent, material, and substantial evidence on the whole record." *Catalina*, *supra* at 18-19; *see also* Const 1963, art 6, § 28; MCL 24.306(1)(d). "Substantial evidence" is evidence "which a reasonable mind would accept as adequate to support a conclusion," and "consists of more than a scintilla of evidence, but less than a preponderance of the evidence." *Id.* A determination regarding whether an agency decision was based on competent, material, and substantial evidence involves a thorough review of the entire record by the Court and an independent assessment of the whole record. *Beebee v Haslett Public Schools*, 406 Mich 224; 278 NW2d 37 (1979).

The MTT and Court of Appeals decisions involve issues of statutory construction. This Court considers such issues *de novo*. *Danse Corp v Madison Heights*, 466 Mich 175, 178; 644 NW2d 721 (2002).

ARGUMENT

I. LEAVE TO APPEAL IS APPROPRIATE BECAUSE THE COURT OF APPEALS AND MTT DECISIONS INVOLVE LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THIS STATE'S JURISPRUDENCE AS REQUIRED BY MCR 7.302(B)(3). THEY ALSO ARE CLEARLY ERRONEOUS, CONFLICT WITH OTHER SUPREME COURT AND COURT OF APPEALS DECISIONS, AND WILL CAUSE MATERIAL INJUSTICE AS CONTEMPLATED BY MCR 7.302(B)(5).

A. The Court Of Appeals Opinion And MTT Decisions It Affirms Constitute A New Interpretation Of Statutes; Reduce The Amount Of Due Process Owed To Property Owners When Special Assessments Are Levied; Conflict With Settled Law Regarding The MTT's Exclusive Jurisdiction Over All Matters Relating To Special Assessments; Conflict With Settled Law Holding That Special Assessments Are Valid Only Where There Is Proportionality Between The Amount Of The Special Assessment And The Benefits Derived From The Improvement; And Have Extensive Implications.

This Court should grant leave to appeal because this case implicates issues of major significance to the State's jurisprudence. First, it constitutes a novel interpretation of Act 188 and the Tax Tribunal Act. The Court of Appeals, affirming MTT dictum, determined that a township's resolution approving a change to a special assessment design plan, passed years after the initial assessment was levied, "has no effect" on the MTT's jurisdictional requirements under Act 188 and the Tax Tribunal Act to hear a property owner's complaint either that the township failed to comply with the procedures mandated by Act 188 or that the design plan alteration results in a substantial and unreasonable disproportionality between the assessment and actual benefit received under the altered plans.

No Michigan appellate decision explicitly addresses the statutory and due process effects of a township's retroactive and post-levy changes to a public improvement project, including the effect of such actions on the MTT's jurisdiction to hear complaints regarding statutory noncompliance and resulting disproportionality between the assessment previously levied and the actual benefit received. The Court of Appeals suggested in *Anderson v Selma Twp*, 95 Mich App 112, 118; 290 NW2d 97 (1980), that a purported confirmation of a special assessment might be invalid if subsequent alterations were made to the project. In *Houdek v Garfield Twp*, unpublished per curiam of the Court of Appeals, decided April 28, 2000 (Docket No. 216951) (*see* Apx. J), the MTT had concluded that the special assessment district was invalid because the township failed to follow the statutory requirements in collecting a sufficient number of signatures to support the creation of the district. The Court of Appeals determined that the MTT erred in vacating the special assessment but, because the petitioner's appeal had been untimely, the Court did not address the issue of the effect of the township's failure to follow the statutory requirements and did not reach the MTT's rationale.

This case further implicates legal issues of major significance because it involves the question of what fundamental due process — procedural and substantive — is owed to property owners when special assessments are levied, particularly where alterations are made years after the special assessment is levied. In *Alan v Wayne Co*, 388 Mich 210; 200 NW2d 628 (1972), this Court stressed the importance of the governmental entity's giving fully explanatory notice, stating:

> Where public officials are acting under a constitutional and statutory duty to give notice to the public of what the government proposes, and especially where it concerns rights of electors respecting important undertakings of

> government such as the issuance of bonds secured by taxing powers, then the government and its public officials, in the exercise of the duty of informing, occupy a position of trust and a fiduciary standard should be applied to them. In giving notice to taxpayers regarding public securities, to comport with due process the notice must be phrased with the general legal sophistication of its beneficiaries in mind. As phrased it must not make any misleading or untrue statement; or *fail to explain, or omit any fact*, which would be important to the taxpayer or elector in deciding to exercise his rights. In short, the notice may not be misleading under all the circumstances.

Id. at 352-353 (citation omitted; emphasis added). In this case, no notice was given that the alterations would be made, or that they would result in disproportionality between the assessment previously levied and the benefit actually received. The decisions rendered by the Court of Appeals and MTT in this case are incompatible with the principles emphasized in *Alan*.

Those decisions also are incompatible with this Court's view that due process requires proportionality between the amount of a special assessment and the benefit it confers. In *Kadzban v City of Grandville*, *supra*, 422 Mich 495, this Court recognized:

> [M]unicipalities are not free to levy special assessments without regard for the amount of benefit that insures to the assessed property. For a special assessment to be valid, there must be some proportionality between the amount of the special assessment and the benefits derived therefrom. In the absence of such a relationship, the special assessment would be **akin to the taking of property without due process of law**.

442 Mich at 501-502 (citations to *Dixon Rd* omitted) (emphasis in original.)

Third, the case is of additional significance because, as discussed in Argument B at pages 27-30 below, the Court of Appeals' ruling conflicts with settled law, including *Wikman v Novi*, 413 Mich 617; 322 NW2d 103 (1982), holding that the MTT has exclusive jurisdiction over all matters relating to special assessments. It also conflicts with settled law of *Kadzban*, *supra*, and *Dixon Rd Group v Novi*, 426 Mich 390; 395 NW2d 211 (1986), holding that special assessments are valid only where there is

proportionality between the amount of the special assessment and the benefits derived from the assessment.

Fourth, as discussed in Argument B at pages 26-29 below, the Court of Appeals and MTT decisions are clearly erroneous. They are contrary to Act 188's plain language; they are contrary to the Tax Tribunal Act's plain language; they violate the fundamental due process protections announced in *Kadzban*, *Dixon Rd*, and *Alan*; they disregard the basic requirements for the application of collateral estoppel; and they are not supported by the evidentiary record. They result in material injustice – Highland was assessed $3.2 million for a benefit it did not receive and never had an opportunity to contest the special assessment on that ground.

Finally, the case has major significance because of the magnitude of its implication, not only for Highland, but for all property owners who are specially assessed. The State's 1,242 townships (as well as all municipalities, including cities, villages and counties, under other similar statutes) **routinely** levy special assessments for public improvements. Indeed, Act 188 authorizes townships to levy assessments for at least fifteen types of public projects including storm and sanitary sewers; water systems; public roads; public parks; elevated structures for foot travel; disposal of garbage and rubbish; bicycle paths; erosion control structures or dikes; trees; lighting systems; sidewalks; aquatic weeds and plants; private roads; lakes, ponds, rivers, streams lagoon or other bodies of water; dams; sound attenuation walls and sound mitigation treatment. Nor are special assessment amounts inconsequential—in this case Highland alone was assessed approximately $3.2 million for a public improvement project that has changed seven years into the assessment's term.

Unless reversed, the Court of Appeals and MTT decisions would leave property owners without remedy to challenge a township's post-levy actions, even if they are so

egregious as to wholly eliminate the benefit for which the special assessment was levied. Unless reversed, the Court of Appeals and MTT decisions also would render the MTT unable to enforce the very statute it was legislatively charged with overseeing.

B. Leave To Appeal Should Be Granted Because The Court of Appeals And MTT Decisions Are Clearly Erroneous And Will Cause Material Injustice.

The MTT and Court of Appeals decisions commit errors of law in a number of significant ways. First, the Court of Appeals concluded that the MTT lacked jurisdiction under a patently inapplicable statute, Section 25 of the Tax Tribunal Act, MCL 205.725. (Apx. A, p 6). This statutory provision does not concern the MTT's jurisdiction. Moreover, the applicable provision, Section 35 of the Tax Tribunal Act, MCL 205.735(2), does not preclude Highland's appeal in Docket 906 because, as the statute's plain language requires, Highland timely appealed to the MTT the Township's final decision or determination regarding the project design. The final decision or determination that Highland sought to review in Docket 906 was the Township's May 13, 2004 resolution that approved the design alteration that purported to remove the sewer trunkline from Highland's Property while keeping the level of assessment ($3.2 million) the same as when the planned sewer trunk line traversed the Property. This May 13, 2004 resolution was the only Township determination and decision that definitively established the sewer design that the Township actually and ultimately intended to use for the sewer line's construction. The governing body ordinarily can act only by ordinance or resolution, and a resolution is the form in which the governing body expresses a determination or directs a particular action. *See Kalamazoo Municipal Utilities Ass'n v Kalamazoo*, 345 Mich 318, 328; 76 NW2d 1 (1956).

Second, the Court of Appeals committed an error of law and adopted a wrong legal principle in holding that Section 6(3) of Act 188, MCL 41.726(3), barred Highland's petition in Docket 906 on the ground that, "because petitioner failed to challenge the December 2, 1999, assessment within 30 days of its confirmation, the Tax Tribunal had no jurisdiction to address petitioner's challenge to the assessment." (Apx. A, p 6.) The Court of Appeals decision suggests that it is wholly inconsequential to Act 188's statutory process if a township formally acts to alter a public improvement project design years after a special assessment amount has been levied and confirmed. Such a finding is clearly erroneous because the Township's late actions necessarily operate as a new township "confirmation" that commences the 30-day challenge period under Act 188. In the alternative, the late actions do not effectuate the confirmed special assessment roll and design alteration.

Third, the Court of Appeals ruling conflicts with settled law, including *Wikman*, *supra*, holding that the MTT has exclusive jurisdiction over all matters relating to special assessments. It also conflicts with settled law in *Kadzban*, *supra*, and *Dixon Rd*, *supra*, holding that special assessments are valid only where there is proportionality between the amount of the special assessment and the benefits derived from the assessment.

Fourth, the Court of Appeals wrongly determined that Highland's petition in Docket 906 was barred by collateral estoppel. The Court recited that "[t]he Tax Tribunal already ruled that it had no jurisdiction over petitioner's challenge [sic] the December 2, 1996, roll assessment because petitioner failed to initiate the challenge within 30 days of confirmation of the roll assessment" but it erroneously concluded that "[t]his issue actually and necessarily [was] determined in the prior proceeding" and that "the same parties had a full and fair opportunity to litigate the issue." (Apx. A, p 5.) In fact, the MTT's March 19, 2004 decision in Docket 431 relied upon by the Court of Appeals cannot

preclude consideration of the challenge raised in Docket 906 because the Township action at issue in Docket 906 was taken **years after** the actions involved in Docket 431 and months after the MTT issued its decision in Docket 431. Michigan law does not allow the application of preclusion principles to claims that arise after judgment in the first action. *See Askew v Ann Arbor Public Schools*, 431 Mich 714, 726; 433 NW2d 800 (1998) (employee awarded workers compensation benefits is not barred from later claim based on change in condition after first award); *Said v Rouge Steel Co*, 209 Mich App 150, 159; 530 NW2d 765 (1995) (*res judicata* and collateral estoppel do not bar serial suits to collect maintenance and cure benefits). Moreover, because Docket 431 was not severed by the MTT from pending cases so that it could be appealed as a final judgment, Highland was deprived of a full and fair opportunity to litigate the issues in Docket 431 and the judgment in Docket 431 never culminated in a valid final judgment that could support issue preclusion before Docket 906 was dismissed.

Finally, in addition to holding that the MTT lacked jurisdiction to consider Highland's claims in Docket 906 because they allegedly were time barred under Act 188, the Court of Appeals ruled, without citation to any authority, that "the Tax Tribunal does not have exclusive jurisdiction over any claim that respondent failed to comply with the Public Improvement Act or any request that respondent be required to rebuild the sewer" because such a claim "does not seek review 'relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws." (Apx. A, p 6.) As discussed in Argument V, at pages 45-47 below, this conclusion overlooks the plain meaning of the term "relating," as well as prior appellate decisions.

For these reasons, this Court should peremptorily reverse the Court of Appeals judgment and MTT orders or, in the alternative, it should grant leave and reverse the Court of Appeals judgment and the MTT decisions it affirms.

II. THE COURT OF APPEALS AND MTT DECISIONS COMMIT ERRORS OF LAW AND ADOPT WRONG LEGAL PRINCIPLES BECAUSE THEY ERRONEOUSLY CONCLUDE THAT THE MTT LACKED JURISDICTION UNDER THE TAX TRIBUNAL ACT AND ACT 188 TO HEAR HIGHLAND'S PETITION IN DOCKET 906.

Citing no authority and without any analysis, the Court of Appeals determined that the Township's May 13, 2004 resolution formally adopting the sewer design changes "had no effect on the jurisdictional requirements of MCL 205.725" and "as in the prior petition, because petitioner failed to challenge the December 2, 1999, assessment within 30 days of its confirmation, the Tax Tribunal had no jurisdiction to address petitioner's challenge to the assessment." (Apx., p 6.) The MTT similarly had concluded it was without jurisdiction to consider Highland's Docket 906 petition. The Court of Appeals and MTT jurisdictional conclusions are not supported by either the Tax Tribunal Act or Act 188.

A. The MTT Possessed Jurisdiction Under The Tax Tribunal Act To Consider Highland's Petition In Docket 906 Because The Township's May 13, 2004 Resolution Was A "Final" Decision Or Determination Regarding The Sewer Project's Design.

The Court of Appeals conclusion that the MTT lacked jurisdiction under MCL 205.725 is clearly erroneous because MCL 205.725 does not concern the MTT's jurisdiction. Instead, that section of the Tax Tribunal Act concerns the MTT's location, accommodations, administrative assistance and salaries and expenses:

> Sec. 25. (1) The principal office of the tribunal and its chief clerk shall be in the city of Lansing, and the department of administration shall furnish suitable accommodations and equipment there.
>
> (2) Subject to appropriations therefor, the tribunal shall have such legal, technical, and secretarial assistance as the chairman deems necessary.

(3) A clerk or employee of the tribunal shall not provide legal, accounting, or technical assistance relevant to a federal, state or local tax matter, or to any other matter of which the tribunal may acquire jurisdiction.

(4) Salaries and expenses of the tribunal shall be paid as provided by law.

MCL 205.725.

Even if the Court of Appeals' citation to MCL 205.725 was a scrivener's error and the Court intended to reference the MTT's jurisdiction under MCL 205.735(2) that is "invoked by a party in interest, as petitioner, filing a written petition within 30 days after the final decision, ruling, determination or order that the petitioner seeks to review," the Court of Appeals conclusion is erroneous because Highland timely appealed to the MTT the Township's final decision or determination regarding the project design, i.e., the May 13, 2004 resolution.

A statute's language is to be construed according to its plain meaning, *Mayor of Lansing v Michigan Public Service Comm*, 470 Mich 154, 157-158; 680 NWd 840 (2004), and a dictionary definition may be used to establish the meaning of a word having a common usage. *Michigan Millers Mutual Ins Co v Bronson Plating* Co, 445 Mich 558, 568; 519 NW2d 864 (1994). The word "final" is defined in the *Random House Webster's College Dictionary* (1997), p 487, as:

> 1. pertaining to or coming to an end; last in place, order, or time. 2. Ultimate: *the final goal.* 3. Conclusive or decisive: *a final decision.* 4. Constituting an end or purpose: *a final result.* 5. *Law.* Precluding further controversy on the questions passes upon: *a final decree.*—n 6. Something that is last or terminal . . . . [Emphasis in original].[5]

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[5] This definition is consistent with other dictionary definitions. The American Heritage Dictionary (2nd Ed) (1991), p 504, defines "final" as:

> 1. Forming or occurring at the end; last. 2. Of, pertaining to, or constituting the last element in a succession, process, or procedure: *the final movement of the concerto* 3. Ultimate and definitive; unalterable: *The*

The "final" decision or determination that Highland sought to review in Docket 906 was the Township's May 13, 2004 resolution. The May 13, 2004 resolution was the **only** Township determination and decision that definitively established the sewer design that the Township **actually** and **ultimately** intended to use and did use for the sewer line's construction. Indeed, until the Township formally passed its May 13, 2004 resolution, there was no conclusive or decisive Township decision or determination regarding the Township's plan to alter the design. Before May 13, 2004, the only approved Township plan was the design plan that had the sewer trunkline across the Property — a design that Highland found acceptable because the benefits to its Property were proportionate to the $3.2 million assessment.

It is undisputed in this case that the resolution was passed on May 13, 2004. By law, the Township could have taken this action only by resolution. MCL 41.725(1), *Kalamazoo Municipal Utilities*, *supra,* 345 Mich at 328. It also is undisputed in this case that Highland filed its MTT petition in Docket 906 challenging the May 13, 2004 decision and determination on June 4, 2004. Because Highland filed within the 30-day time

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> *judge's decision is final.* –n. Something that comes at or forms the end, esp.: a. The last or one of the last of a series of athletic contests. b. The last examination of an academic course. [Emphasis in original].

The word "final" is defined in Black's Law Dictionary (6th Ed) (1991), p 434, as:

> last; conclusive; decisive; definitive; terminated; completed. As used us reference to legal actions, this word generally contrasted with "interlocutory." For res judicata purposes, a judgment is "final" if no further judicial action by court rendering judgment is required to determine matter litigated.

period established by MCL 205.735(2), its appeal was timely and the MTT possessed jurisdiction to hear the case under the Tax Tribunal Act.

B. The MTT Possessed Jurisdiction Under Act 188 To Consider Highland's Petition In Docket 906 Because The Township's May 13, 2004 Resolution Either Operated As A New "Confirmation" Or Was Without Any Effect.

Similar to its faulty reading of Section 35(2) of the Tribunal Act, the Court of Appeals committed an error of law and adopted a wrong legal principle in holding that Section 6(3) of Act 188 barred Highland's petition in Docket 906. Section 6(3) of Act 188 provides that "[a]fter the confirmation of the special assessment roll, all assessments on that assessment roll shall be final and conclusive unless an action contesting an assessment is filed in a court of competent jurisdiction within 30 days after the date of confirmation." MCL 41.726(3). The Court said, "because petitioner failed to challenge the December 2, 1999, assessment within 30 days of its confirmation, the Tax Tribunal had no jurisdiction to address petitioner's challenge to the assessment." (Apx., p 6.) This statement misperceives the process-concluding function of "confirmation" in the Act 188 process and suggests that it is wholly inconsequential to that process if a township alters a public improvement project design years after a special assessment amount has been levied. The Court of Appeals holding is clearly erroneous because the Township's later-taken informal actions necessarily operated as a new township "confirmation" that commenced the 30-day challenge period under Act 188. In the alternative, if the May 13, 2004 resolution did not operate as a new "confirmation" subject to appeal, that action was completely invalid.

The fallacy of the Court of Appeals logic is revealed by a review of the Act 188 process for establishing a public improvement's design, including the designated times for altering the project design. Under Section 4, the first section of Act 188 that

addresses design plans, it is mandatory that the township have definite plans describing the improvement and its location. Section 4(1) provides that a township, upon the township board's determination that it desires to proceed with the improvement, "shall cause to be prepared plans describing the improvement and the location of the improvement with an estimate of the cost of the improvement on a fixed or periodic basis, as appropriate." MCL 41.724(1) (emphasis added). The word "shall" generally is used to designate a mandatory provision. *Old Kent Bank v Kal Kustom Inc,* 255 Mich App 524, 532; 660 NW2d 384 (2003). That is, the statute grants the township no discretion for estimated, or less than formal, plans.

Section 4(2) requires the township board to fix a time and place to hear any objections to the petition, to the improvement, and to the special assessment district. The notice of the hearing that the township board must cause to be provided "shall state that the plans and estimates are on file with the township clerk for public examination" and "shall contain a description of the proposed special assessment district." MCL 41.724(2) (emphasis added).[6]

Further, the statute requires that after the township files the plans with the township clerk, makes its tentative decision to proceed with the project, and tentatively identifies the special assessment district, the information the township gives to the public must include the definite plans. Section 4(2) requires the township board to fix a

[6] In contrast, Section 4(1) authorizes townships to prepare an "estimate" of cost. It states that the township "shall cause to be prepared plans describing the improvement and the location of the improvement with an estimate of the cost of the improvement on a fixed or periodic basis, as appropriate." *See* MCL 41.724(1) (emphasis added). No similar language in Section 4 exists providing for an "estimate" of the project design. As recognized in *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993), "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there."

time and place to hear any objections to the petition, to the improvement, and to the special assessment district. The notice of the hearing that the township board must cause to be provided "shall state that the plans and estimates are on file with the township clerk for public examination" and "shall contain a description of the proposed special assessment district." *Id.* (emphasis added.)

After public notice is issued, the township board must conduct a hearing to consider objections to the petition, to the improvement, or to the special assessment district. MCL 41.724(2). It is only at this hearing that the Legislature has authorized the township board to "revise, correct, amend or change the plans, the estimate of cost or the special assessment district." MCL 41.724(3) (emphasis added.)

If, after the public hearing held under Section 4 of Act 188, the township board still desires to proceed with the improvements, Section 5 of Act 188 explicitly requires the township to finalize the public improvement's design plans by passing a resolution. The township either must approve the design plans as originally planned or approve the plans as revised, corrected, amended, or changed as a result of the Section 4 public hearing. Section 5 states that the township "shall approve or determine by resolution" the following: (1) the completion of the improvement; (2) "the plans and estimates as originally presented or as revised, corrected, amended, or changed"; (3) the sufficiency of the petition for the improvement, if required; and (4) the special assessment district, including the special assessment district's term. MCL 41.725(1)(a), (b), (c), (d). It also requires the Township Supervisor to make a special assessment roll with amounts proportionate to the benefits derived, and to certify that, to the best of his knowledge, he conformed with Michigan statutes, including Act 188. MCL 41.725(1)(2).

Once the Township Supervisor reports the special assessment roll to the township board, the board then must "appoint a time and place when it will meet, review, and hear any objections to the assessment roll." MCL 41.726(1). It is at this hearing or a subsequent meeting that the township board "may confirm the special assessment roll as reported to the township board by the supervisor or as amended or corrected by the township board"; where it "may refer the assessment roll back to the supervisor for revision"; or it may "annul it and direct a new roll to be made." MCL 41.726(2).

The record is clear that the Township failed to conform with the Act 188 process in altering the project's design plan. The Legislature, however, contemplated the possibility of irregularities in the special assessment process and provided a specific remedy. Under Section 13 of Act 188, following a deviation from the mandated scenario, the township must go back in the statutory process to the time when the informality, irregularity, or illegal action occurred, then follow the statutory process. Section 13 of Act 188 states:

> Whenever any special assessment shall, in the opinion of the township board, be invalid by reason of irregularities or informalities in the proceedings, or if any court of competent jurisdiction shall adjudge the assessment to be illegal, the township board shall, whether the improvement has been made or not, whether any part of the assessment has been paid or not, have the power to proceed from the last step at which the proceedings were legal and cause a new assessment to be made for the same purpose for which the former assessment was made. All proceedings on such reassessment and for the collection thereof shall be conducted in the same manner as provided for in the original assessment, and whenever an assessment or any part thereof levied upon any premises has been so set aside, if the same has been paid and not refunded, the payment so made shall be applied upon the reassessment.

MCL 41.733 (emphasis added.) Section 13 is the only provision that remotely contemplates post-levy changes — and it does so with a preservation of due process for the property owner, including a right to challenge the township's actions. Under Section 13, after the

Township determined it desired to alter the public improvement design plans, the Township should have repeated the procedures outlined in Sections 4, 4a, and 5 of Act 188. Instead, the Township merely adopted a single resolution that retroactively "acknowledged, approved and ratified" "all changes" in the sanitary sewer improvement project. It also incorporated the design plan alterations in previously created documents and rescinded all previous resolutions, or parts of resolutions, that were inconsistent with the May 13, 2004 resolution.

Although the May 13, 2004 resolution was clearly intended to "confirm" a special assessment roll that included an altered design for the public improvement and assessments to pay for the altered design, the Township's actions in passing the May 13, 2004 resolution to change the design plans are likely defective and without effect under Section 13 because they do not reflect compliance with the requirements mandated by Sections 4, 4a, or 5. But assuming the May 13, 2004 resolution was valid under Act 188, it was a "confirmation" from which the 30-day filing deadline ran.

III. THE COURT OF APPEALS AND MTT DECISIONS COMMIT ERRORS OF LAW AND ADOPT WRONG LEGAL PRINCIPLES IN DETERMINING THAT THE MTT LACKED JURISDICTION TO HEAR HIGHLAND'S PETITION IN DOCKET 906 BECAUSE SUCH CONCLUSION WOULD DEPRIVE PROPERTY OWNERS OF SUBSTANTIAL DUE PROCESS.

If a township's actions, taken post-confirmation and post-levy of special assessments, are not held to operate as either a new confirmation (even if defective) that triggers MTT review or to be entirely invalid, property owners like Highland would be deprived of due process in two significant ways. First, contrary to Act 188 and this Court's *Dixon Rd* and *Kadzban* decisions, property owners would be subject to the taking of property without the due process of law where post-levy township actions result in actual benefits that are disproportionately low compared to the amount assessed. Second, such

township actions would eliminate the substantial due process protections of notice and candor mandated by this Court's *Alan* decision.

A. Act 188 And This Court's Decisions In *Dixon Rd* and *Katzban* Require Proportionality For All Assessments In Order To Satisfy Due Process Requirements.

For almost 90 years this Court has recognized that a special assessment is a specific levy to recover the costs of improvements that confer local and peculiar benefits upon property within a defined area. *See Kuick v Grand* Rapids, 200 Mich 582, 588; 166 NW2d 979 (1918) ("It is agreed that the assessment cannot exceed the benefit to be derived from the improvement, and that the theory sustaining such levies is that the party assessed is locally and peculiarly benefited over and above the ordinary benefit which as one of the community he receives in all public improvements to the precise extent of the assessment."). *See also Knott v City of Flint*, 363 Mich 483, 499; 109 NW2d 908 (1961) (stating that special assessments "are sustained upon the theory that the value of the property in the special assessment district is enhanced by the improvement for which the assessment is made."). In *Dixon Rd*, *supra*, this Court held that special assessments are permissible only when the improvements result in an increase in the value of the land specially assessed. *Id.*, 426 Mich at 400. Likewise, this Court has recognized:

> [M]unicipalities are not free to levy special assessments without regard for the amount of benefit that inures to the assessed property. For a special assessment to be valid, there must be some proportionality between the amount of the special assessment and the benefits derived therefrom. In the absence of such a relationship, the special assessment would be **akin to the taking of property without due process of law**.

Kadzban, *supra,* 442 Mich 495 at 501-502 (citations to *Dixon Rd* omitted) (emphasis in original.) Act 188 also requires proportionality between the amount of the assessment and the benefits derived. Section 5(1)(d) requires special assessment rolls to assess against each parcel of land an amount that "shall be the relative portion of the whole

sum to be levied against all parcels of land in the special assessment district as the benefit to the parcel of land bears to the total benefit to all parcels of land in the special assessment district." MCL 41.725(1)(d).

If a township's actions in changing a project design years after the special assessment was levied are not characterized as a new "confirmation" that triggers MTT jurisdiction, then there can be no review of a township's attempt to eliminate benefits for which an assessment was levied. By denying MTT jurisdiction to review such post-confirmation, post-levy changes, the Court of Appeals opinion strips from Act 188 the means to ensure that the original proportionality remains, and no late taking of property without due process has occurred.

This case is a textbook example of the substantial injustice that could occur if the Court of Appeals' faulty reasoning is upheld. Here, the Township levied an assessment in 1996 of $3.25 million for a sewer improvement project wherein the sewer traversed the Property. More than seven years later, on May 13, 2004, the Township passed a resolution altering the design such that the sewer no longer traversed the Property. Despite the removal of the sewer line from the Property, the Property remained assessed at $3.2 million even though it was acknowledged by the MTT that the design alteration reduced the benefit to the Property. (Apx. E, Twp. 7/7/04 Br. Mtn. Sum. Disp., Ex. B, Trib. Order Dkt. 431, pp. 31-32.) Under the Court of Appeals and MTT's rationales, such township actions — regardless how egregious — are entirely insulated from review. This preposterous result, clearly not intended by the Legislature, should not be permitted by this Court.

B. Under This Court's *Alan* Decision, Due Process Requires Candor In The Statutory Notice Given By Governmental Units.

The Court of Appeals and MTT decisions are erroneous because they abrogate other key due process protections recognized by this Court. Michigan law ensures that taxpayers receive adequate due process in special assessment proceedings by requiring townships to provide taxpayers with notice that conveys accurate information about the projects funded by the assessments. Here, the Township failed to provide such information and the MTT's dismissal of Docket 906 effectively approved that denial of due process.

In *Alan v Wayne Co, supra*, this Court held that a notice concerning a stadium construction project was defective in its method of reaching taxpayers because it was published in fine print. This Court rejected any notion that taxpayers must conduct an exhaustive search or rely upon chance to see a notice that fundamentally affects their rights. *Id.*, 388 Mich at 350-351. This Court determined that the notice provided was defective also "because it fails to inform the reader of its purpose and because it is misleading." *Id.* at 351. In reaching its decision, this Court stated:

> Where public officials are acting under a constitutional and statutory duty to give notice to the public of what the government proposes, and especially where it concerns rights of electors respecting important undertakings of government such as the issuance of bonds secured by taxing powers, then the government and its public officials, in the exercise of the duty of informing, occupy a position of trust and a fiduciary standard should be applied to them. In giving notice to taxpayers regarding public securities, to comport with due process the notice must be phrased with the general legal sophistication of its beneficiaries in mind. As phrased it must not make any misleading or untrue statement; or *fail to explain, or omit any fact*, which would be important to the taxpayer or elector in deciding to exercise his rights. In short, the notice may not be misleading under all the circumstances.

Id. at 352-353 (citation omitted, emphasis added).

Similarly, in *Trussell v Decker*, 147 Mich App 312; 382 NW2d 778 (1985), where a landowner contested a water improvement project special assessment in part because the notice failed to state that the project had been initiated by the township board and because

it suggested that the landowner's only right was to voice objections at a public hearing, the Court of Appeals affirmed the order enjoining the project. The trial court had found the notice to be insufficient, stating:

> In the case here under consideration, plaintiff would have had to file her *written* objections at or before the May 15, 1984 public meeting, and she would have had to have had sufficient co-objections (record owners of land) to constitute 'more than 20%' of the total land area in the special assessment district. Was there anything—any wording whatsoever—contained in the Notice she was mailed which told her either of those things? The answer is obvious. Not only was she *not* told of these two requirements, but the statutory language contained in the notice is so inherently deceptive and misleading as to lead her to believe to the contrary: '*All objections and comments pertaining to said improvement will be heard at said hearing*' Like the taxpayer in *Alan v Wayne County*, 388 Mich. 210, 331 [200 N.W.2d 628] (1972)], she was '*lulled to sleep*' by being told that 'all objections * * * will be heard.' Plaintiff in the case here under consideration could no more make an *informed judgment* about the fact that her objections needed to be *in writing* and about whether she should start organizing her friends and neighbors to file such objections 'to prevent the imposition of a potentially enormous additional tax burden' than the Plaintiffs in the *Alan* case.

Id. at 316 (emphasis supplied by trial court). The Court of Appeals agreed with the trial court that the notice was misleading and stated:

> Not only must the notice comply with the requirements of the statute, it must not be worded in such a way that it precludes the people affected from discovering or exercising other rights they may have under other applicable statutes.

Id. at 325. *See also Anderson v Selma Twp*, *supra*, 95 Mich App 112 at 118 (Court of Appeals suggesting that a purported confirmation of a special assessment might be invalid if subsequent alterations were made).

The Court of Appeals opinion and the MTT decisions it affirms disregard the law established by *Alan* and *Trussell* and effectively authorize townships to mislead their property owners by providing inaccurate information. As in those cases, here, the Township sought to exercise its taxing powers to undertake a public improvement project on behalf of taxpayers, thus holding a position of trust and a fiduciary relationship to them. There is no

dispute that all of the public notices and materials available for inspection during the statutory process showed a trunk line across the Property; that the special assessment roll was confirmed based upon those materials; that the Township, at an undetermined time following confirmation of the special assessment roll, acted without resolution to remove the trunk line from the Property; and that it was only by chance that Highland became aware of the project design alteration. Like the *Alan* and *Trussell* taxpayers, Highland was "lulled to sleep" by misleading information about the Project's design. Under *Alan and Trussell*, Highland cannot be bound by the Township actions taken pursuant to such defective notice and is entitled to an opportunity to challenge the Project design alteration and the lack of proportionality resulting from the design plan approved on May 13, 2004.

IV. THE COURT OF APPEALS DECISION COMMITS AN ERROR OF LAW AND ADOPTS WRONG LEGAL PRINCIPLES IN DETERMINING THAT COLLATERAL ESTOPPEL BARS THE PETITION IN DOCKET 906.

The Court of Appeals determined that Highland's petition in Docket 906 was barred by collateral estoppel because "[t]he Tax Tribunal already ruled that it had no jurisdiction over petitioner's challenge [sic] the December 2, 1996, roll assessment because petitioner failed to initiate the challenge within 30 days of confirmation of the roll assessment" and "[t]his issue actually and necessarily [sic] determined in the prior proceeding" and "the same parties had a full and fair opportunity to litigate the issue." (Apx. A, p 5.) But the record is clear that the issue raised in Docket 906 was not and could not have been determined in the prior proceeding. Erroneously ignoring that fact, the Court of Appeals erred further in concluding that the parties had a full and fair opportunity to litigate the issue.

"Collateral estoppel precludes relitigation of issues between the same parties."[7] *VanVorous v Burmeister*, 262 Mich App 467, 479-80; 687 NW2d 132 (2004). "Where 'a question of fact essential to the judgment [has] been actually litigated and determined by a valid and final judgment,' collateral estoppel bars a litigant from pursuing the same issue again." *Id.* at 480. Generally, for collateral estoppel to apply, the following three elements must be satisfied:

> (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel.

Monat v State Farm Ins Co, 469 Mich 679, 683-684; 677 NW2d 843 (2004). Mutuality of estoppel means that "in order for a party to estop an adversary from relitigating an issue, that party must have been a party, or in privy to a party, in the previous action." *Id.* at 684.

The March 19, 2004 MTT decision in Docket 431 relied upon by the Court of Appeals cannot serve as collateral estoppel to Docket 906 because the issues raised in Docket 906 involved the legality and effect of the Township's May 13, 2004 resolution. The MTT's decision in Docket 431, issued on March 19, 2004, was based on a Proposed Opinion and Judgment issued on January 27, 2004, and on pleadings filed by the parties before November 2003. Without the skills of a soothsayer, the MTT could not possibly have addressed and decided the legality or effect of the Township's future action, to be taken by resolution two months later. Moreover, and as discussed *supra* at pages 32-36, the Township's May 13, 2004 resolution was either legally invalid in its entirety because it failed to start the Act 188 process again, or it started the 30-day clock for Highland to initiate an

[7] The collateral estoppel doctrine differs from *res judiacata*, which precludes relitigation of claims between the same parties.

appeal to the MTT. These issues are entirely independent of those relating to the 1996 assessment that was the subject of Docket 431. Michigan law does not allow the application of preclusion principles to claims that arise after judgment in the first action. *See Askew v Ann Arbor Public Schools, supra*; *Siira v Employers Mut Liability Ins Co*, 87 Mich App 227, 234; 274 NW2d 26 (1978) ("a judgment cannot be dispositive of a cause of action based upon facts which occur subsequent to the entry of that judgment"); *Said v Rouge Steel Co, supra*.

Finally, the Docket 431 decision never culminated in a valid final judgment before Docket 906 was dismissed. Nor did Highland have a full and fair opportunity to litigate on appeal the issue in Docket 431 whether the MTT correctly determined that it lacked jurisdiction. Highland timely appealed the MTT's March 19, 2004 Order in Docket 431. The Township responded by filing a motion to dismiss for lack of jurisdiction, arguing that the the MTT Order in Docket 431 was not a final appealable order because the case with which it was consolidated, Docket 534, was still pending. (Apx. D, High. 7/16/04 Br. Opp. Mtn. Sum., pp. 7-8.) The Court of Appeals agreed and dismissed Highland's claim of appeal for lack of jurisdiction.[8] (Apx. D, High. 7/16/04 Br. Opp. Mtn. Sum., Ex. 6.) Having successfully argued that there was no final order, the Township now is estopped, and should have been estopped in the Court of Appeals and MTT, from claiming that the March 19, 2004 decision was a final order with preclusive effect. *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994) ("a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position

[8] In its April 15, 2005 Opinion, the Tribunal disagreed with the Court of Appeals July 2004 opinion that the 431 judgment was not a final order or judgment. (Apx. B, Trib. 4/15/05 Order Dkt. 906, p. 3.)

in a subsequent proceeding"); *Hall v McRea Corp*, 238 Mich App 361, 366; 605 NW2d 354 (1999) (same).

Moreover, based on the public record, there is no way to determine that Dockets 534 and 431 were not still consolidated when Highland filed petition 906 or when the Township moved to dismiss the petition, arguing preclusion. Even the Court of Appeals decision speculated that "the claims in MTT Docket No. 266534 **were apparently severed** from MTT Docket 261431 because the Tax Tribunal later consolidated those claims with the claims in [Docket 906]." (Apx. A, p 6, emphasis supplied). The official docket of the MTT reflects no order severing Docket 431 from any pending docket. Nor did the MTT ever expressly state in any opinion before its April 15, 2005 opinion that it viewed the dockets as having been severed. Mere speculation should not be the basis for applying the collateral estoppel doctrine. A court speaks through its orders and not its oral pronouncements. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). The last pronouncement on the status of Docket 431 was an appellate court's ruling that Docket 431 was not a final judgment or final order because it still was consolidated with a pending docket. Absent a valid and final judgment in the prior proceeding, there could be no issue preclusion here.

V. THE COURT OF APPEALS DECISION COMMITS AN ERROR OF LAW AND ADOPTS WRONG LEGAL PRINCIPLES IN DETERMINING THAT THE PETITION IN DOCKET 906 DID NOT "RELATE TO" A SPECIAL ASSESSMENT OR SEEK A "REFUND OR REDETERMINATION OF TAX."

In addition to holding that the MTT lacked jurisdiction to consider Highland's claims in Docket 906 because they purportedly were time barred under Act 188 and the Tax Tribunal Act, the Court of Appeals determined that "the Tax Tribunal does not have exclusive jurisdiction over any claim that respondent failed to comply with the Public Improvement Act or any request that respondent be required to rebuild the sewer." (Apx. A, p 6.) According to the Court of Appeals, Highland's claim fails to invoke the MTT's jurisdiction under Section 31 of the Tax Tribunal Act because it "does not seek review 'relating to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws" and the petition in Docket 906 does not seek "a refund or redetermination of a tax under the property tax laws." (Apx. A, p 6.)[9]

The Court of Appeals conclusion both overlooks the plain meaning of the term "relating" and is refuted by appellate decisions interpreting "relating" in other statutes.

The term "related," including the variant "relating," is defined as:

> 1. To narrate or tell. 2 To bring into logical or natural association. –intr. 1. To have connection, relation, or reference. 2. To interact with others in a meaningful or coherent fashion: *couldn't relate well with her peers.* 3. To respond, esp. in a favorable manner.

[9] Exactly the opposite conclusion was reached by the Livingston County Circuit Court in its October 15, 2004 Opinion and Order granting summary disposition in the Township's favor. That Court held that it lacked subject matter jurisdiction to consider these types of claims because such subject matter jurisdiction rested exclusively with the MTT. (Apx. F, Twp. 11/5/04 Mtn. Recon. Order Den. Resp. Mtn. Sum. Disp., Ex. C, 10/15/04 Cir. Ct. Order.)

The American Heritage Dictionary (2nd Ed) (1991), p 1043. *See also Sanders Confectionery Products, Inc v Heller Financial, Inc*, 973 F2d 474 (CA 6, 1992), *cert den* 506 US 1079 (1993) (Court holding that a matter is "related to" the bankruptcy case so as to be within the district court's jurisdiction if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy); *Metropolitan Life Ins Co v Pressley*, 82 F3d 126 (CA 6, 1996), *cert den*, 520 US 1263 (1997) (a law "relates to" ERISA plan if it has connection with or reference to such plan).

A property owner's challenge to the procedures used by a township in determining and levying a special assessment has a "logical," "natural association," "relation" and "connection" to a special assessment. Without the statutory procedures under Act 188, no assessment would be possible. In fact, the Court of Appeals previously has recognized that Act 188 is "a rather elaborate and lengthy **process** designed to determine the need for and **assess** the cost of public improvements." *Rusak v Acme Twp*, *supra* at 813 (Emphasis added).

The Court of Appeals conclusion also conflicts with this Court's examination of the scope of the MTT's exclusive jurisdiction in two cases: *Wikman v Novi*, *supra*, and *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728; 322 NW2d 152 (1982). In *Wikman*, the plaintiffs sought injunctive relief in the circuit court, alleging that the special assessments imposed on them had been determined in an arbitrary and capricious manner. This Court ruled that the challenge to the special assessments was within the MTT's exclusive jurisdiction because the action sought "direct review of the governmental unit's decision concerning a special assessment for a public improvement." *Wikman, supra,* 413 Mich at 626.

In comparison, the plaintiffs in *Romulus City* filed a constructive fraud claim in the circuit court, challenging the drain commissioner's use of funds collected through special assessments. This Court held that the circuit court (and not the MTT) had jurisdiction to hear the case because the question was whether the drain commissioner could pay administrative costs with special assessment funds. Unlike *Wikman*, *Romulous City* did not pose a direct challenge to the special assessment. This Court's ruling in *Wikman* is controlling here because Highland's petition in Docket 906 sought direct review of the statutory effect of the Township's May 13, 2004 resolution approving alteration of the public improvement's design, as well as a determination whether the $3.2 million special assessment was levied according to the benefits received as a result of the design alteration.

Finally, the Court of Appeals determination that the petition in Docket 906 does not seek a "refund" is flatly wrong and refuted by the evidentiary record. Highland's petition specifically requests that the MTT "reduce the special assessment imposed on Highland's property, because it is not proportional to the benefit to the property and is not imposed in accordance with the proportionality requirements of MCL 41.725(1)(2), and order a refund with interest as provided by law." (Apx. G, High. 6/14/04 Pet. Dkt. 906, p 4.) Thus, contrary to the Court of Appeals' determination, both the subject matter of Highland's Docket 906 claim and the relief it requests are within the MTT's statutory purview. The MTT clearly has jurisdiction to consider the petition in Docket 906.

CONCLUSION AND REQUEST FOR RELIEF

The Court of Appeals Opinion errs by relying on *res judicata* and collateral estoppel where those doctrines are inapplicable. The Court of Appeals Opinion also effectively excuses a township's noncompliance with the requirements of Act 188,

effectively condones a township's denial of a special assessment property owner's right to challenge either post-confirmation and post-levy changes to a special assessment project or the proportionality of the benefit of the changed project to the assessment, and effectively approves a township's denial of due process by failing to give notice and by providing inaccurate information about a special assessment project. For these reasons, Highland-Howell Development Company, LLC respectfully requests that this Court peremptorily reverse the Court of Appeals judgment and MTT orders or, in the alternative, grant it leave and reverse the Court of Appeals and MTT decisions.

Respectfully submitted,

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